8-24-2009

Lake CDA Investments v. Dept. of Lands Appellant's Reply Brief Dckt. 35323

Nos. 35323/35326

IN THE SUPREME COURT OF THE STATE OF IDAHO

LAKE CDA INVESTMENTS, LLC, and CHRIS KEENAN,

Plaintiffs-Respondents, and

v.

IDAHO DEPARTMENT OF LANDS; THE IDAHO STATE BOARD OF LAND COMMISSIONERS; and THE STATE OF IDAHO,

Defendants-Appellants, and

IDAHO DEPARTMENT OF TRANSPORTATION,

Intervener-Appellant.

DEFENDANTS-APPELLANTS' REPLY BRIEF

On appeal from the District Court of the 1ST Judicial District of the State of Idaho, in and for the County of Kootenai
Honorable John T. Mitchell, District Judge

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A. THE "MOST UNUSUAL OF CIRCUMSTANCES" EXISTED WHERE THE PROPOSED DOCKS WOULD HAVE ENCROACHED UPON ITD'S HIGHWAY WITHOUT DUE PERMISSION.

Under the Lake Protection Act (LPA), noncommercial navigational encroachment permit applications are to be processed with minimal procedural requirements and may be denied where the Land Board finds: (1) that the encroachment would, or may, infringe upon the riparian or littoral rights of an adjacent property owner; or (2) that "the most unusual of circumstances" exist warranting denial. Idaho Code § 58-1305(a). In this case, the "most unusual of circumstances" arose when the Idaho Transportation Department (ITD) intervened in the permit application proceedings, asserting both that ITD would not issue the highway encroachment permits required to construct and use the proposed docks and that the proposed docks would interfere with ITD's highway easement along the shoreline. Given that ITD's objections appeared reasonable, the Land Board's decision to deny the proposed encroachment permits was neither arbitrary, capricious, nor an abuse of its discretion. As such, the Land Board's decision should be affirmed.

i. The Land Board's Findings Of Fact And Conclusions Of Law Demonstrate That It Properly Applied The Criteria Prescribed By Idaho Code § 58-1305(a) In Denying The Applicants' Lake Encroachment Permit Applications.

Applicants contend that the "most unusual of circumstances" prong of Idaho Code § 58-1305(a) is inapplicable because that particular term does not appear within the Land Board's order. See Respondents' Response Brief at 32–33. To the contrary, in order for the Land Board to have denied the proposed lake encroachment permits, it was not necessary for the Board to have employed the magic words, "the most unusual of circumstances." Idaho Code § 58-1305(a).

In Workman Family P'ship v. City of Twin Falls, 104 Idaho 32, 655 P.2d 926 (1982), this Court indicated that while effective judicial review under the Idaho Administrative Procedure Act requires an administrative agency to clearly set forth its findings of facts and conclusions of law, the agency need not employ the "magic words" of the governing statute:

> "'If there is to be any meaningful judicial scrutiny of the activities of an administrative agency-not for the purpose of substituting judicial judgment for administrative judgment but for the purpose of requiring the administrative agency to demonstrate that it has applied the criteria prescribed by statute and by its own regulations and has not acted arbitrarily or on an ad hoc basis-we must require that its order clearly and precisely stated what it found to be the facts and fully explain why those facts lead it to the decision it makes. Brevity is not always a virtue.'
>
> . . .
>
> We wish to make it clear that by insisting on adequate findings of fact we are not simply imposing legalistic notions of proper form, or setting an empty exercise for local governments to follow. No particular form is required, and no magic words need be employed. What is needed for adequate judicial review is a clear statement of what, specifically, the decisionmaking body believes, after hearing and considering all the evidence, to be the relevant and important facts upon which its decision is based. Conclusions are not sufficient."

Id. at 37, 655 P.2d at 931 (quoting S. of Sunnyside Neighborhood League v. Bd. of Comm'rs, 569 P.2d 1063, 1076–77 (Or. 1977)) (emphasis added). Furthermore, the law presumes that public officials act lawfully and within the scope of their authority. Roberts v. Bd. of Trs., Pocatello, Sch. Dist. No. 25, 134 Idaho 890, 894–95, 11 P.3d 1108, 1112–13 (2000); Monson v. Boyd, 81 Idaho 575, 582, 348 P.2d 93, 97 (1959). Here, the Land Board clearly set forth its reasoning for why it denied the proposed dock permits along with its findings of fact and conclusions of law in support thereof. See AR 47 (Findings of Fact and Conclusions of Law).

As a result, this case is appropriate for judicial review[1], and the Applicants' argument that the Land Board is precluding from asserting its authority under the "the most unusual of circumstances" prong of the statute is inapplicable.

ii. It Was Reasonable For The Land Board To Require Compliance With All ITD Highway Right-of-Way Encroachment Rules Before It Issued A Permit.

In this case, the Land Board's decision to deny the proposed dock permits was based, in part, upon the Board's findings that the docks would have violated Lake Encroachment Rule 020.03, which requires that all lake encroachments conform to all otherwise applicable laws and regulations: "Nothing in these rules shall excuse a person seeking to make an encroachment from obtaining any additional approvals lawfully required by federal, local or other state agencies." IDAPA 20.03.04.020.03. Supported by substantial and competent evidence, the Land Board found that ITD regulations required the Applicants to obtain highway encroachment permits for their proposed docks, that the Applicants had not obtained highway encroachment permits, that the Applicants had not applied for highway encroachment permits, and that ITD indicated that it would not approve highway encroachment permits for the Applicants proposed docks. See Defendants-Appellants' Opening Brief at 9–18. Given those findings, the Land Board acted well within its discretion when it denied the proposed permits pending final approval from the applicable governmental agencies. See Defendants-Appellants' Opening Brief at 15–17. As a result, the Land Board's determination that the Applicants' failure to comply with Lake Encroachment Rule 020.03 warranted denial of the proposed dock permits was both reasonable and supported by the evidence in the record.

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[1] Were the Court to find that the Land Board was required to make an express finding as to the existence of "the most unusual of circumstances," the proper remedy would be to remand this case back to the Land Board for further findings. See Workman Family Partnership v. City of Twin Falls, 104 Idaho 32, 655 P.2d 926 (1982).

a. The Land Board's Finding That The Proposed Docks Would Have Encroached Upon The State's Highway, Thus Implicating ITD's Jurisdiction, Was Supported By Substantial And Competent Evidence.

The Applicants assert in their response brief that the proposed docks would have only occurred "on the water," and therefore, ITD's jurisdiction does not apply in this case. See Respondents' Response Brief at 31 (emphasis added). That assertion is quite surprising given the Applicants' clear admissions to the contrary. For instance, the Applicants' permit applications plainly show that the proposed docks would have involved both the installation of pilings into the submerged portions of the highway structure as well as the installation of ramps upon the exposed portions of the highway. See Amended AR 5, Ex. 17 (Lake CDA Investments, *LLC's Lake Encroachment Permit Application*), Ex. 25 (*Chris Keenan's Lake Encroachment* Permit Application).[2] Moreover, the Applicants' attorney confirmed to the district court that the proposed docks would in fact encroach upon the highway structure: "Will the dock touch the ground at some point in time? Yeah, they usually do because people don't put docks in for purposes of swimming out to get to their dock to go to their boat." Tr. p. 37, L. 2–5. Accordingly, the argument that ITD had no tangible interest in the installation of the proposed docks is not only contrary to the evidence in the record, see Defendants-Appellants' Opening Brief at 9–13, but also contrary to the Applicants' own admissions.

[2] On July 30, 2007, the administrative record was filed with the district court. Citations to the administrative record will begin with the designation "AR", followed by the number such document was assigned in the certificate of administrative record. For example, the third page of the hearing officer's Findings of Fact and Conclusions of Law would be AR 47 at 3. On September 27, 2007, an amendment to the administrative record was filed with the district court. Citations to the documents in the amendment will begin with the designation "Amended AR", followed by the number such document was assigned in the amended certificate of administrative record. For example, the third page of the Idaho Transportation Department's Pre-Hearing Memorandum would be Amended AR 2 at 3.

b. The Land Board Correctly Concluded That The Docks Would Have Required Highway Encroachment Permits.

Having found that the proposed docks would have encroach upon ITD's highway and highway prism, see Defendants-Appellants' Opening Brief at 9–13, the Land Board correctly concluded that: "In accordance with IDAPA 39.03.42 ITD requires encroachments onto the road prism be granted permits from ITD." AR 47 at 10. That finding is supported by the plain, unambiguous terms of IDAPA 39.03.42.200.01, which require that any entity planning to construct an encroachment on a State highway or to use the highway right-of-way for any purpose other than normal travel shall obtain a permit. See IDAPA 39.03.42.200.01; see also IDAPA 39.03.42.200.02 ("No activities shall be allowed on State highway rights-of-way until an approved permit has been issued by the Department or a delegated local highway agency.").

It is now only on appeal that the Applicants argue that ITD's Highway Encroachment Rules, IDAPA 39.03.42, do not apply to them because the Rules were promulgated after the 1940 right-of-way deed. See Respondents' Response Brief at 31. In fact, the Applicants took a contrary position below, expressly conceding that they would need an ITD permit for any encroachment on the road or road prism:

> This is not a situation where we are dealing with an encroachment on the road prism. This application only seeks approval for an encroachment over the State waters. If and when it is necessary to make application to place improvements (such as stairs) from the edge of the right-of-way over the prism to access the dock, then that application will be processed pursuant to regulations vesting DOT with jurisdiction.

R. Vol. I, p. 96 (Applicants' Opening Brief). Because the Applicants have raised the issue that they are exempt from the Highway Encroachment Rules as a matter of law for the first time on appeal, that issue is not properly before this Court and should not be considered. See Rammell v.

Idaho State Dept. of Agric., 145 Idaho __, __, 10 P.3d 523, 529 (2009).

Applicants argue further that ITD's permit requirements do not apply because their proposed docks present no encroachment "of any significance," Respondents' Response Brief at 31, and that the docks would have only a "de minimis 'contact'" with the highway structure. Id. at 32. That argument fails for at least a couple of reasons. First, ITD's Highway Encroachment Rules provide no exception for "de minimis" encroachments. Quite to the contrary, the Highway Encroachment Rules provide that "No activities shall be allowed on State highway rights-of-way until an approved permit has been issued by the Department." IDAPA 39.03.42.200.02. Second, substantial and competent evidence in the record, including expert testimony and analysis, supports the Land Board's factual determinations that the proposed docks would in fact have interfered with the highway structure. See Defendants-Appellants' Opening at 20–23. The Applicants' conclusory statements to the contrary, see Respondents' Response Brief at 32, cannot overcome the evidence in the record or the standards of review under the Idaho Administrative Procedure Act. See Urrutia v. Blaine County, 134 Idaho 353, 357, 2 P.3d 738, 742 (2000) ("[T]he agency's factual determinations are binding on the reviewing court, even where there is conflicting evidence before the agency, so long as the determinations are supported by substantial competent evidence in the record").

Furthermore, the fact that issues regarding the applicability of ITD's Highway Encroachment Rules have been drawn into this case only supports the Land Board's finding that the "most unusual of circumstances" existed. The Idaho Department of Lands (IDL) and the Land Board should not be forced into the position of adjudicating complex issues of highway encroachment law through the lake encroachment permitting process. Where legitimate issues

exist regarding the applicability of other governmental agency approvals, IDL and the Land Board retain the discretion to invoke the "most unusual of circumstances" criterion to deny the lake encroachment permits pending resolution of those issues before the agency of competent jurisdiction. See Defendants-Appellants' Opening at 15–17.

c. Where Perfection Of The Lake Encroachment Permits Required Approval From ITD, The Applicants Failed To Show That Their Rights Have Been Prejudiced.

Nowhere in their response brief have the Applicants shown that they have been prejudiced by the Land Board's decision. A party challenging an agency decision must show not only that the agency decision erred in a manner specified in Idaho Code § 67-5279(3), but also that a substantial right of the party has been prejudiced. Price v. Payetter County Bd. of County Comm'rs, 131 Idaho 426, 429, 958 P.2d 583, 587 (1998). The Applicants in this case have not, and can not, show any such prejudice given that perfection of the lake encroachment permits—i.e., construction and use of the proposed docks—would have been contingent upon further ITD approval regardless of the Land Board's decision. ITD's Highway Encroachment Rules are clear and unambiguous—all entities planning to construct an encroachment on a State highway or to otherwise use the highway right-of-way for any purpose other than normal travel shall obtain a permit. IDAPA 39.03.42.200.01, 200.02. The Applicants have presented numerous arguments as to why they may be entitled to a highway permit, but they cannot avoid the initial necessity of such a permit. As a result, any prejudice that the Applicants' have suffered is a result of their failure to obtain an ITD permit, not their failure to obtain a lake encroachment permit. The Applicants are free to reapply at a later date, provided they obtain the necessary ITD approvals. See Lake Encroachment Rule 020.07.j ("The applicant may reapply at a later date, but will be

required to pay another filing fee and publication fee, if applicable.").

B. THE APPLICANTS, AS SERVIENT ESTATE HOLDERS, DO NOT POSSESS THE RIGHT TO CONSTRUCT A DOCK WHEN SUCH CONSTRUCTION WOULD INTERFERE WITH USES AUTHORIZED UNDER THE EASEMENT DEED OF THE DOMINANT ESTATE HOLDER, ITD.

In this case, the Applicants argue that their littoral interest in wharfing out is somehow absolute. The Applicants argue that they cannot be denied a permit to wharf out despite the following facts: (1) there is a valid easement running over the shoreline boundary of their property; (2) pursuant to that easement, there is a highway that runs over the shoreline boundary of their property; (3) the Applicants' shoreline boundary is currently buried beneath the highway structure; (4) the highway runs not only along the Applicants' shoreline boundary, but it also runs more than 75 feet past the boundary and onto the State's submerged lands; (5) pursuant to Idaho common law, statutes, and regulations, the Applicants must obtain an ITD permit for any and all activities upon the State's highways; and (6) the Applicants have not produced any permit, or other written authorization, granting them access to the highway to construct the proposed docks.

For the following reasons, the Applicants' right to wharf out is not absolute. First, there is no precedent for implying an exception into an easement deed to allow the servient estate holder to use the burdened parcel absolutely for wharfing out purposes. Applicants assert that "[i]t is self-evident that [the Applicants' predecessors-in-interest] did not include any right of control over the [Applicants'] littoral rights . . . ." See Respondents' Response Brief at 23. Yet, the Applicants have not, and can not, point to any language in the 1940 right-of-way deed that would except that particular use from the burden of the dominant highway purpose. Implying such an exception would run contrary to well established Idaho law that holds that all uses of the

burdened parcel are servient to the dominate use, absent an express exception, providing a dominant estate holder unlimited reasonable use of its right-of-way for the purpose specified. See Conley v. Whittlesey, 133 Idaho 265, 271, 985 P.2d 1127, 1133 (1999); Viebrock v. Gill, 125 Idaho 948, 952–53, 877 P.2d 919, 923–24 (1994); Abbott v. Nampa Sch. Dist. No. 131, 119 Idaho 544, 548, 808 P.2d 1289, 1293 (1991). While the Applicants attempt to overcome this principle by offering drawings of a dock in the vicinity of the subject shoreline depicted in an ITD calculation sheet map circa 1943, see Amended AR 1, Ex. S (Calculation Sheets circa 1943), those drawings are, however, irrelevant and inadmissible to the extent that they are offered to contradict the clear language of the 1940 deed. See Bliss v. Bliss, 127 Idaho 170, 174, 898 P.2d 1081, 1086 (1995). "[W]here a deed is plain and unambiguous, the intention of the parties must be determined by the deed itself. 'Oral and written statements are generally inadmissible to contradict or vary unambiguous terms contained in a deed.'" Id. (citation omitted). Here, the 1940 right-of-way deed expressly stated that the State was entitled to the use of the burdened parcel "for the purpose of a public highway forever." Amended AR 1, Ex. F (1940 Right-of-Way Deed). Nowhere in the 1940 deed was any limitation put on the stated highway purpose, and nowhere in the 1940 deed was any exception made for the proposed docks. See Respondents' Response Brief at 21 (agreeing with the district court's finding that the "1940 Smith Right-of-Way Deed is silent as to littoral rights"). The Applicants' extrinsic evidence—constituting a drawing on a map dated at least three years after the deed—is inadmissible and immaterial to contradict the clear statements in the deed. Thus, ITD is entitled to the free use of the burdened estate shoreline for highway purposes pursuant to the 1940 deed.

Second, the Applicants' littoral interest in wharfing out is appurtenant to a parcel of real property that is located more than 75 feet upland of the current shoreline. AR 47 at 10, 11; Amended AR 16 at 83–86, 185–87; Amended AR 10, Ex. DD (2007 Photograph Showing Proposed Dock Location). As a result, the Applicants' argument in this case assumes not only that they impliedly retained the right to wharf out to the detriment of the duly granted easement purpose, but also that the Applicants impliedly received a grant of their own from the State to access and encroach upon the State's highway fill material located between the appurtenant parcel of real property and the realigned shoreline. While the 1940 right-of-way deed clearly contemplated realignment of the existing shoreline to allow the highway to extend out into the lake, there is nothing in the deed or in any other document in the record that grants the Applicants a permit, right, other interest to encroach upon the State's highway fill material. In fact, the common law as it existed at the time of the consummation of the 1940 right-of-way deed indicates that any such permit—were it to exist—would have been revocable nonetheless:

> [W]e are of the opinion that the sounder rule, and the rule supported by the better reasoned cases, is to the effect that the streets, from side to side and end to end, belong to the public, and are held by the municipality in trust for the use of the public. . . . It follows that any one obtaining a permit from the city, for the private use of a public street, as in this case, takes the same with notice that it is subject to revocation at the will of the city, and, indeed in this view, it matters not whether the use is made in accordance with a permit or without one, the use is merely permissive in either event, and revocable at any time without notice.

Keyser v. City of Boise, 30 Idaho 440, 444–45, 165 P. 1121, 1122 (1917).[3]

[3] This Court's decision in West v. Smith, 95 Idaho 550, 511 P.2d 1326 (1973) did not address specifically the facts as presented in this case. There, the Court determined that "the fact that a public roadway adjoins waters on which the public has a right to navigate, does not give one member of the public, acting solely for his private benefit, the right to install a fixed structure from the roadway into the water, which permanently interferes with the littoral owner's right of access to the lake from that point." Id. at 555, 511 P.2d at 1331. The State, as owner of the public roadway, was not however a party to that litigation. As a result, the State's interest in maintaining its highway system, and in defending its easement rights, was not before the Court in West.

Third, the Applicants have similarly failed to present any evidence that the State has agreed to limit its use of its submerged real property for highway purposes in order to accommodate the Applicants' proposed encroachments. Again, this case deals with a conflict of uses that are proposed to occur on the State's submerged real property. Nowhere in the 1940 right-of-way deed or in any other document in the record did the State expressly agree to restrict its use of its submerged lands, and in Idaho such a restrictive covenant cannot be implied. See Brown v. Perkins, 129 Idaho 189, 192, 923 P.2d 434, 438 (1996). Instead "[a]ll doubts and ambiguities are to be resolved in favor of the free use of land." Id.

Fourth, the fact that ITD may have extended the highway fill material further into the lake, and outside of the 1940 right-of-way boundaries, is immaterial. The Applicants argue that by extending the highway further into the lake, ITD has impermissibly "landlocked" the Applicants' littoral access. See Respondents' Response Brief at 18, 28–30. That argument wrongfully assumes, however, that the Applicants had a pre-existing right of access and encroachment upon the fill material along the realigned shoreline. As discussed above, the Applicants' had no such right. The Applicants' argument also wrongfully assumes that an additional right-of-way was required for ITD to expand its activities further into the lake. Again, any such activities that occurred beyond the original shoreline occurred upon the State's submerged lands and not upon the Applicants' real property. As a result, any such extension did not require the Applicants' approval and did not constitute an enlargement of the 1940 right-of-way.

C. A LITTORAL PROPERTY OWNER DOES NOT ACQUIRE A PROPERTY RIGHT IN SUBMERGED LANDS OWNED BY THE STATE WHEN THE ACQUISITION DOES NOT SERVE THE PURPOSES OF THE PUBLIC TRUST DOCTRINE.

As discussed in detail in Defendants-Appellants' Opening at 26–36, the proposition that the Applicants acquired a property interest in the State's submerged lands in this case is without merit.

i. The Question Of Ownership Of The Filled Lands Was Not Properly Before The Land Board Or The District Court.

The Land Board did not resolve the question of who owns the filled-in beds of Lake Coeur d'Alene along the subject shoreline in its May 21, 2007 order, nor could it have. It does not have jurisdiction over such matters. Such ownership questions "could only have been resolved by a quiet title action brought before a court." Rural Kootenai Org., Inc. v. Bd. of Comm'rs, 133 Idaho 833, 842, 993 P.2d 596, 605 (1999) (emphasis added) (county did not have jurisdiction to determine, in proceedings for preliminary plat approval, who owned submerged land within a proposed subdivision). This case was in no way a quiet title action before a court of competent jurisdiction.[4] This was an administrative hearing before an agency hearing officer regarding an application to construct a boat dock. As such, the sole issue before the district court for consideration on appeal was whether the agency's decision to deny the permit was valid under the Idaho Administrative Procedure Act. See R. Vol. I, p. 1 (Petition for Review). To the extent that the district court held that the Applicants have an ownership interest, right, or benefit to the filled-in beds of Lake Coeur d'Alene along the subject shoreline as against the State, it

[4] No where in the Applicants' Petition for Review do they claim to be the owner of submerged lands of the State or do they implicate title 6, chapter 4 of the Idaho Code, the chapter dealing with actions to quiet title. See R. Vol. I, p. 1. In fact, Applicants concede that the State owns the submerged lands: "The submerged beds of Lake Coeur d'Alene lying below the ordinary high water mark are owned and managed by the Idaho State Board of Land Commissioners . . . ." R. Vol. I, p. 2.

went far beyond the narrow scope of judicial review provided by Idaho Code § 67-5279.

The fact that the issue of ownership of these filled-in lands has been drawn into this case only supports the Land Board's finding that the "most unusual of circumstances" existed. IDL and the Land Board should not be forced into the position of adjudicating quiet title actions through the lake encroachment permitting process. Where legitimate issues exist regarding the ownership of littoral property, IDL and the Land Board retain the discretion to invoke the "most unusual of circumstances" criterion to deny the permits pending resolution of the title dispute by a court of competent jurisdiction.

ii. A Littoral Owner Does Not Obtain Title To Formerly Submerged Lands Where The Change In Boundaries Is Due To Permissive Artificial Avulsion.

This Court should clarify that those portions of the district court's holding addressing title to those submerged lands lying under the highway fill were not properly before the Land Board or the district court. Should, however, this Court reach the merits, it is clear that the district court's holding was in error, for it was based on the erroneous premise that artificial fill is akin to a natural accretion. Perhaps that is why the Applicants' discussion of this issue in their response brief is limited to a single footnote:

> The District Court did observe that the artificial fill would inure to the benefit of the Respondents based upon prevailing authorities: "These cases correctly announce the law ... that when artificial accretions are cast upon the land of the landowner by either the Corps. of Engineers or some stranger without the intervention of the upland owner such artificial accretion inures to the title of the upland owner." CR, Vol. II, p. 329 (citing H. K. Porter Company, Inc. v. Board of Supervisors of Jackson County, 324 So.2d 746, 750 (Miss. 1975) (additional citations omitted). Otherwise, the littoral landowner could effectively be "landlocked" and unable to exercise the control aspect of his or her littoral property.

Respondents' Response Brief at 30 n.11. The Applicants' reliance on this particular quote from

the district court's decision is flawed in the following respects.

First, the facts in this case show that the changes to the subject shoreline were a result of avulsions not accretions. Where an "[a]ccretions is the process of gradual addition of solid material," Smith v. Long, 73 Idaho 309, 311, 251 P.2d 206, 207 (1952), an avulsion "is a sudden and perceptible loss or addition to land by the action of water, or a sudden change in the bed or course of a stream." Nesbitt v. Wolfkiel, 100 Idaho 396, 398 n.1, 598 P.2d 1046, 1048 n.1 (1979). In this case, the State filled in the shoreline adjacent to the Applicants' parcel in order to realign the existing highway. There can be no dispute that such construction involved anything less than a "sudden and perceptible" change to the shoreline, and it certainly was not a "gradual addition." As avulsive lands, title remains with the original owner, which in this case is the State. Aldape v. Akins, 105 Idaho 254, 256 n.1, 668 P.2d 130, 132 n.1 (Ct. App. 1983); see also Nesbitt v. Wolfkiel, 100 Idaho 396, 398, 598 P.2d 1046, 1048 (1979) (acknowledging "the generally accepted rule that the owner of riparian land acquires title to all additions to his land caused by accretion . . . , unless the change takes place suddenly by avulsion") (emphasis added); Harper v. Holston, 119 Wash. 436, 442, 205 P. 1062, 1064 (1922) ("sudden and rapid change" in water boundaries "is termed in law an avulsion, and differs from an accretion in that the one is violent and visible, while the other is gradual, and perceptible only after a lapse of time") (cited in support in Smith v. Long, 73 Idaho 309, 251 P.2d 206 (1952)).

Second, the Court's decision in Idaho Forest Indus., Inc. v. Hayden Lake Watershed Improvement Dist., 112 Idaho 512, 516, 733 P.2d 733, 737 (1987) (IFI) indicates that any human-caused filling or draining of submerged lands, whether sudden or gradual, cannot divest the state of its sovereign title to submerged lands:

> While those equitable principles in certain circumstances may no longer apply to public trust property which has lost its navigable status naturally, . . . it may well be that a loss of navigability resulting from a manmade dike or diversion may not, for equitable reasons, eliminate or destroy the public trust status of land which was once subject to that public trust.

Id. at 517, 733 P.2d at 738. The three-justice concurrence took a firmer position, finding explicitly that the State's trust obligations survive the artificial filling of submerged lands:

> [F]illed or otherwise drained trust land must remain impressed with the public trust and not subject to adverse possession. . . . [¶] The state may convey public trust lands only where the conveyance serves public trust interests. This Court has stressed that the state must carefully weigh competing trust interests prior to alienation. The conveyance generally remains subject to the public trust even after title has passed. See Kootenai Environmental Alliance, supra. Adverse possession would defeat all of these public interest protections.

Id. at 521, 733 P.2d at 742 (Huntley, Donaldson, & Bristline, JJ., concurring); see also Mississippi State Highway Comm'n v. Gilich, 609 So. 2d 367, 374 (Miss. 1992) ("Suffice it to say that once the state possesses public trust lands it is deemed to possess such property forever."). Applying the IFI analysis to the facts in this case, there can be no argument that the State continues to own the submerged lands under the highway fill. The State placed fill upon its submerged lands for an indisputably public purpose, all with the express consent of the upland landowner. To hold otherwise would disregard the concurring opinion in IFI as well as the State's trust obligations to protect the submerged lands for public purposes.

Third, even if the Court were to assume, for purposes of argument, that the highway fill constituted accretion rather than avulsion and that littoral owners can gain title to artificial accretions caused by others, the district court's decision must still be overturned, for it failed to apply the exception to the common law rules of accretion and avulsion prohibiting a littoral landowner from gaining title to lands artificially created by, or with the consent of, the littoral

landowner. The case cited by the Applicants in their response brief, H. K. Porter Co. v. Bd. of Supervisors of Jackson County, 324 So.2d 746, 750 (Miss. 1975), makes this very point in specifying that the landowner gains the benefit of artificial accretions where they are deposited by either the Army Corps of Engineers or "some stranger." In this case, the State was not a stranger; the Applicants' predecessors-in-interest expressly consented to allow the State to fill in their shoreline in order to accommodate the highway. That being the case, the Applicants' predecessors-in-interest played an affirmative part in the creation of those lands, and therefore, they do not gain the benefit thereof under the reasoning of H. K. Porter Co. See also State v. Gill, 66 So. 2d 141 (Ala. 1953) ("Unless restricted by statute the right to alluvion does not depend upon whether the additions to the soil resulted from natural or artificial causes, and the riparian owner is entitled to accretions when created by artificial conditions created by third persons in which he has no part.") (emphasis added); Lakeside Boating and Bathing Inc. v. State, 344 N.W.2d 217, 220 (Iowa 1984) ("A riparian owner cannot acquire accretions caused by artificial means under the riparian owner's control."); State ex rel. State Lands Comm'n v. Super. Ct., 900 P.2d 648, 650 (Cal. 1995) ("The general California rule is easy to state. If the accretion was natural, the private landowners own it; if it was artificial, the state owns it."); Mississippi State Highway Comm'n, 609 So. 2d at 374–75 (littoral landowners do not gain title to artificial accretions as against the State).

iii. Applicants' Right Or Interest In The State's Submerged Lands Would Violate The Public Trust Doctrine.

The assertion that artificial fill placed on submerged lands by state agencies divests the public of ownership of the underlying submerged lands fails to recognize the strict limitations placed on disposal of submerged lands by the Public Trust Doctrine. The Court in Kootenai

Envtl. Alliance, Inc. v. Panhandle Yacht Club, Inc., 105 Idaho 622, 625, 671 P.2d 1085, 1088 (1983) (KEA), identified a two-part test to determine whether impairments and alienations of public trust property comply with the Public Trust Doctrine: "One, is the grant in aid of navigation, commerce, or other trust purposes, and two, does it substantially impair the public interest in the lands and waters remaining?" KEA, 105 Idaho at 626, 671 P.2d at 1089. Furthermore, the "central substantive thought in public trust litigation," In re Sanders Beach, 134 Idaho 443, 454, 147 P.3d 75, 85 (2006), must also be considered:

> [w]hen a state holds a resource which is available for the free use of the general public, a court will look with considerable skepticism upon any governmental conduct which is calculated either to relocate that resource to more restricted uses or to subject public uses to the self-interest of private parties.

Id. at 454, 147 P.3d at 85. The district court's holding that the placement of artificial fill on submerged lands for highway purposes provides to the littoral property owner an interest or benefit in such lands beyond those interests shared by other members of the public is contrary to each of these Public Trust Doctrine principles, see Defendants-Appellants' Opening at 33–36 (discussing the Public Trust Doctrine in more detail), and therefore, the Court should reverse the district court's finding that the Applicants' had a "right" or "benefit" to the State's submerged lands.[5]

D. ITD HAD STANDING TO PARTICIPATE IN THE ENCROACHMENT PERMITTING PROCESS.

ITD has standing to participate in this matter where its property interest in its highway right-of-way was at issue. Applicants argue that only adjoining littoral property right owners may participate in the navigation encroachment permitting process. Respondents' Response

[5] Applicants have failed to discuss how, let alone present evidence that, such a transfer would satisfy the Public Trust Doctrine.

Brief at 34. To the contrary, standing in a land use decision is to be granted to all parties whose "property will be adversely affected by the land use decision." Cowan v. Bd. of Comm'rs of Fremont County, 143 Idaho 501, __, 148 P.3d 1247, 1255 (2006) (citation omitted). "The existence of real or potential harm is sufficient to challenge a land use decision." Id. (quoting Evans v. Teton County, 139 Idaho 71, 76, P.3d 84, 89 (2003)). ITD's highway right-of-way interest is a property interest sufficient to meet standing requirements. Furthermore, the Applicants should be estopped from arguing otherwise, having stipulated that "ITD has asserted a property interest in the subject proceedings . . . and the disposition of the action would as a practical matter impair or impede ITD's ability to protect that asserted interest." R. Vol. I, p. 43 (Stipulation for Intervention of the Idaho Transportation Department as a Party Defendant).

Moreover, the Applicants' assertion that only adjacent littoral owners have standing to object to encroachment applications ignores the fact that the statutes governing encroachments recognize two independent grounds for denial of encroachment applications: infringement of the rights of adjacent littoral owners and the presence of unusual circumstances. The "most unusual of circumstances" provision embodies the principle that there may be circumstances where the scope of persons with legitimate concerns about the proposed encroachment is not limited to adjacent property owners. See IDAPA 20.03.04.003.03 ("Upon request or when the department deems it appropriate, the department may furnish copies of the application and plans to federal, state and local agencies and to adjacent littoral owners, requesting comment on the likely effect of the proposed encroachment upon adjacent littoral property and public trust values such as navigation, fish and wildlife habitat, aquatic life, recreation, aesthetic beauty, water quality, etc.").

This Court has recognized that where unusual circumstances exist, the universe of persons with standing to challenge the issuance of an encroachment permit is not limited to the adjoining littoral property owners. In DuPont v. Idaho State Bd. of Land Comm'rs, 134 Idaho 618, 7 P.3d 1095 (2000), the Court recognized that the City of Coeur d'Alene had "substantial rights" at stake with regards to an encroachment that potentially interfered with the use of a city-designated swimming area, even though the City was not an adjacent littoral owner.[6] The Court upheld the revocation of an encroachment permit in response to the City's petition to "reconsider" the grant of the encroachment permit. Id. at 625, 7 P.3d at 1102. The Court affirmed that "the existence of the designated swimming area in the location of the proposed encroachment is highly relevant to the question of whether the proposed encroachment presents 'unusual circumstances.'" Id. Thus, the Court implicitly recognized the standing of parties whose rights are affected due to unusual circumstances to contest encroachment applications, even if such parties are not among those explicitly designated in the statute as entitled to notice and opportunity to object.

E. THE LAND BOARD'S APPROVAL OF NEARBY ENCROACHMENT PERMITS NEITHER RENDERS ITS DENIAL OF THE APPLICANTS' ENCROACHMENTS PERMITS ARBITRARY AND CAPRICIOUS NOR ESTOPS THE LAND BOARD FROM DENYING FUTURE PERMITS.

The Applicants' reliance on the issuance of lake encroachment permits to nearby landowners does not change the equation in this case. The Land Board was bound by statute in its determination of "the most unusual of circumstances," Idaho Code § 58-1305(a), and as set

[6] According to briefs filed in the DuPont appeal, the City's nearest littoral property was approximately a block away from the encroachment. Coeur d'Alene's City Park was located 240 feet from the southeast corner of the Dupont property, and the City owned a riparian lot 195 feet from the southwest corner of the Dupont property. The City also owned the right-of-way to West Lakeshore Drive, which bordered the Dupont property, but there were no littoral or riparian rights appurtenant to the right-of-way. 1999 WL 33913722 at *2 (Brief of Appellant Donald DuPont).

forth in Dupont v. Idaho State Bd. of Land Comm'rs, that determination contemplates consideration of applicable local and state laws. 134 Idaho 618, 625, 7 P.3d 1095, 1102 (2000). Here, ITD asserted that its rules require any person desiring to encroach upon a highway right-of-way must obtain an encroachment permit from ITD, IDAPA 39.03.42.600.01, and that ITD would not issue the required permits. IDL was required by statute to consider ITD's concerns, and in this case, found them to be valid. The outcomes of previous permitting decisions cannot circumvent IDL's statutorily prescribed permitting mandate.

In addition, the Applicants fail to satisfy the elements of quasi-estoppel as applied against the Land Board. Nothing in the record shows that the Land Board took an inconsistent position as to whether Applicants were entitled to the contemplated lake encroachment permits. In fact, Applicants' own testimony proves otherwise. Rick Carr testified:

> I met with Carl Washburn [of IDL], in fact on several occasions. . . . And the purpose of that was to—in trying to do our due diligence up front, to find out the prospects that if indeed [sic] down the road that that property may be subdivided and the likelihood of being able to obtain additional dock permits for those properties that would be adjacent to what is now Lot 1. Carl had indicated at that time that we went over what they—what the requirement, at least, as far as front footage was, 25 feet, really allows somebody that has that right to be able to apply for a dock permit along Coeur d'Alene Lake Drive. . . .

Amended AR 16 at 53 (Administrative Hearing Transcript) (emphasis added). Mr. Washburn's indication that the Applicants had the "right to be able to apply" for a permit cannot in any way be construed as an indication as to how the Land Board might rule on such an application. The Land Board's position has been consistent—the Applicants were free to apply for an encroachment permit, at which time the Land Board would evaluate the validity thereof according to its statutory and administrative directives. That being the case, the Applicants' can show no prejudice.

F. IDL CORRECTLY CONSIDERED ITD'S OBJECTION TO THE PROPOSED ENCROACHMENTS.

IDL accepted the objections filed by ITD in accordance with underlying administrative procedure. Idaho Code section 58-1304 and IDAPA 20.03.04.025 contemplate procedures for objections not only by adjacent landowners asserting interference with littoral rights but also by those who otherwise raise issues of "unusual circumstances." While the statute establishes a 10-day objection deadline for the filing of objections by adjacent littoral owners, it is silent as to the time for the filing of objections by other parties based on the presence of unusual circumstances. Notice to parties affected by unusual circumstances may often be delayed until IDL conducts an initial investigation of the application and discovers facts warranting notice to parties whose rights may be adversely affected by the proposed encroachment. Furthermore, Applicants are estopped from arguing that ITD's objections were untimely, having stipulated that "ITD was an Objector to the issuance of the dock permit in the administrative proceedings below." R. Vol. I, p. 43 (Stipulation for Intervention of the Idaho Transportation Department as a Party Defendant).

G. THE DISTRICT COURT ERRED IN AWARDING COSTS AND ATTORNEYS FEES TO THE APPLICANTS.

i. The Land Board Played A Quasi-Judicial Role, Not An Adversarial Role, In This Case.

The Land Board's role in this matter must be considered in determining whether they acted within a reasonable basis in fact or law. The Land Board was not an adversary to the Applicants below; instead, the Land Board, through IDL, merely provided a forum for the Applicants and the objectors to present their cases. The Land Board then simply analyzed the facts and law presented to it and made a determination based thereon. Upon appeal to the district court, the Land Board did not then "adopt[ ] the arguments of ITD and advance[ ] the same to the

District Court," Respondents' Response Brief at 3. Instead, the Land Board was simply defending its administrative determination below. Acting within its quasi-judicial capacity, the Land Board's consideration and application of applicable state laws was well within its statutory authority and well within reason.

ii. The Land Board Reasonably Asserted Its Position As To Its Discretion Under The Lake Protection Act As Well As To The State's Authority Over The Fill Placed By The State Upon The State's Submerged Public Trust Lands.

As previously discussed, the decision of how to treat any additional governmental approvals, or any outstanding questions of ownership of littoral rights, is left to the discretion of the Land Board. See Idaho Code §§ 58-1305(a), 58-1303; Dupont v. Idaho State Bd. of Land Comm'rs, 134 Idaho 618, 7 P.3d 1095 (2000). The Land Board's decision to deny the lake encroachment permits in this case, pending resolution of those issues before the agency/court of competent jurisdiction, so as to avoid being forced into the position of adjudicating complex issues of highway encroachment law, and littoral property title, through the lake encroachment permitting process was reasonable.

Furthermore, the legal effect that the State's filling of its submerged public trust lands has on an upland landowner's littoral rights is an issue of first impression in Idaho. This is demonstrated by the district court's decision, which relied almost exclusively upon extra-territorial decisions for the conclusion that "the State of Idaho placing fill in Lake Coeur d'Alene at the landowners' shoreline boundary has no effect on the landowners' littoral rights." R. Vol. II, p. 331 (Memorandum Decision and Order on Appeal). None of the extra-territorial decisions, however helpful, address specifically the facts as presented in this case. Therefore, the Land Board acted within reason in pursuing the positions ultimately held to be erroneous. See Sacred

Heart Med. Ctr. v. Boundary County, 138 Idaho 534, 537, 66 P.3d 238, 241 (2003) (denying fees under Idaho Code sections 12-117 and 12-121 where the appeal required the court to interpret a statute for the first time within the contexts of the facts of the case).

The one Idaho case cited by the district court in support of its determination that "the fill has no effect on the landowners' littoral rights," R. Vol. II, p. 325, was not controlling on the relevant issue. The district court cited Merrill v. Penrod, 109 Idaho 46, 52, 704 P.2d 950, 956 (Ct. App. 1985)[7], for the rule that "[a]n easement does not include the right to enlarge the use to the injury of the servient land." Id. at 28. That case does not address the specific facts in this case, however. The Court of Appeals in Merrill was discussing prescriptive easements, not express easements, holding that any enlargement of use claimed as a matter of prescription required the resetting of the 5-year prescriptive clock. Here, there simply has been no claim of prescription. Furthermore, the Land Board's position in this case was that the Applicants' littoral rights were servient to ITD's use of the shoreline for highway purposes, not any enlarged use. For these reasons, Merrill in no way rendered the Land Board's position unreasonable.

The district court also cited a number of extra-territorial decisions for its holding that "as long as it was ITD in the present cases that added fill in front of the landowners' property, the landowners benefit from that artificial accretion." R. Vol. II, p. 330. While that may be true in Massachusetts and in the other states noted by this Court, Justice Huntley's concurring decision in IFI, 112 Idaho 512, 733 P.2d 733 (1987), indicates that the law is quite different in Idaho. In that concurrence, Justice Huntley, joined by two other justices, refuted a lower court's "conclusion that riparian land owners can dike or otherwise drain and fill state lands held in trust,

[7] In its Memorandum Decision and Order on Appeal, the district court cites this case as "Merril", whereas the correct citation is "Merrill."

and subsequently obtain title to those lands by means of adverse possession." Id. at 520, 733 P.2d at 741 (Huntley, Donaldson, and Bistline JJ., concurring). Instead, the Huntley concurrence stated that the California Supreme Court correctly held as follows:

> Where the accretions have resulted, not from natural causes, but from artificial means, such as the erection of a structure below the line of ordinary high water, there is made out a case of purpresture, or encroachment, and the deposit of alluvion caused by such structure does not inure to the benefit of the littoral or upland owner, but the right to recover possession thereof is in the state or its successor in interest, as the case may be.

Id. at 741, 733 P.2d at 520 (citing City of Los Angeles v. Anderson, 275 P. 789, 791 (Cal.1929)). This pronunciation in the Huntley concurrence, however controlling, justifies the reasonableness of the Land Board's position to the satisfaction of Idaho Code section 12-117.

iii. The District Court Erred In Denying The Land Board's Motion To Strike The Supplemental Affidavit Of John F. Magnuson And In Awarding The Applicants Post-Judgment Attorney Fees.

I.R.C.P. 54(d)(5) and 54(e)(5) require that any claim for attorney fees be filed no later than 14 days after the entry of judgment. Pursuant to I.R.C.P. 54(a) and I.A.R. 11(f), all claims for attorney fees by the Applicants were due by April 7, 2008—i.e., 14 days from the entry of the Court's March 24, 2008 Memorandum Decision and Order on Appeal. See I.R.C.P. 54(a) (defining "judgment" as including "any order from which an appeal lies"); I.A.R. 11(a)(2) (providing a right to appeal "[f]rom any final decision or order of the district court on judicial review of an agency decision"). The Applicants filed their supplemental affidavit for additional attorney fees and costs on May 6, 2008. Having been filed nearly a month later than required by the Idaho Rules of Civil Procedure, Applicants' supplemental affidavit was untimely, and therefore, should have been stricken. Furthermore, prevailing parties are not entitled to recover post-judgment attorney fees. Allison v. John M. Biggs, Inc., 121 Idaho 567, 570, 826 P.2d 916,

919 (1992) ("a motion for post-judgment attorney fees is not allowed by any statute or rule, and cannot be properly considered a 'memorandum of costs' under I.R.C.P. 54(d)(5)"). The assertion that the Applicants are free to supplement their memorandum of costs post-judgment and after the 14-day window in order to include those attorney fees incurred in preparing the pleadings necessary to acquire the costs is simply unreasonable. Taken to its logical end, the Applicants are now free to submit a second supplemental memorandum of costs in order to recover those fees incurred in attending the May 8, 2008 hearing on the motion for costs and, presumably, those fees incurred in preparing the pleadings supporting the second supplemental memorandum. And on, and on, and on. The law in Idaho is that a memorandum of costs must be filed within 14 days from the entry of judgment and that prevailing parties are not entitled to recover post-judgment attorney fees. Accordingly, the district court's award of $1,037.01 in post-judgment attorney fees should be reversed.

II. CONCLUSION

The district court's order should be vacated, and the Land Board's order denying the Applicants' proposed lake encroachment permits should be affirmed. Alternatively, the Land Board's order should be set aside and these matters should be remanded to the Land Board for further proceedings as necessary.

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RESPECTFULLY SUBMITTED this 24th day of August 2009.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 24th day of August 2009, I have caused to be served the **DEFENDANTS-APPELLANTS' REPLY BRIEF** on the following persons by the methods indicated:

I. Original and __ copies to:

Idaho Supreme Court
451 West State Street
P.O. Box 83720
Boise, ID 83720-0101

- ☐ U.S. Mail, postage prepaid
- ☒ Hand Delivery
- ☐ Federal Express
- ☐ Facsimile:
- ☐ Statehouse Mail

II. Two copies to:

John F. Magnuson
Attorney at Law
P.O. Box 2350
1250 Northwood Center Court, Suite A
Coeur d'Alene, ID 83814

- ☒ U.S. Mail, postage prepaid
- ☐ Hand Delivery
- ☐ Federal Express
- ☐ Facsimile: (208) 667-0500
- ☐ Statehouse Mail

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Boise, Idaho 83707-1129

- ☐ U.S. Mail, postage prepaid
- ☐ Hand Delivery
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- ☐ Facsimile:
- ☒ Statehouse Mail

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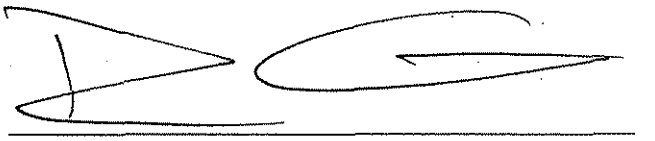

DAVID I. STANISH
Deputy Attorney General

IN THE SUPREME COURT OF THE STATE OF IDAHO

LAKE CDA INVESTMENTS, LLC and CHRIS KEENAN,

Plaintiffs-Respondents,

v.

Supreme Court Docket Nos. 35323-2008/35326-2008

IDAHO DEPARTMENT OF LANDS; THE IDAHO STATE BOARD OF LAND COMMISSIONERS; and THE STATE OF IDAHO,

Defendants-Appellants,

and

IDAHO DEPARTMENT OF TRANSPORTATION,

Intervenor-Appellant.

REPLY BRIEF OF INTERVENOR-APPELLANT IDAHO TRANSPORTATION DEPARTMENT

Appeal from the District Court of the First Judicial District for Kootenai County.
Honorable John T. Mitchell, District Judge, presiding.

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I. INTRODUCTION

Respondents Lake CDA Investments, LLC and Chris Keenan (collectively "Keenan") argue, as they have from the inception of this matter, that because thirty or more docks exist along Lake Coeur d'Alene Drive in the vicinity of the Keenan property, they must have the right to build a dock as well. The reference to other docks forms one of the main lynch pins of Keenan's appellate arguments, in spite of the lack of evidence in the record to give the argument any significance or relevance. Keenan has never adduced or cited to any evidence of the highway easements on the property where the other docks are located, to include copies of any deeds describing the size or location of the highway easement on such other properties, and perhaps most significantly, any evidence of whether private property exists between the highway right of way and the high water mark of the Lake Coeur d'Alene. Further, what evidence exists in the record regarding other docks establishes that the highway easement was a different size, or that private property did exist between the lake and ordinary high water mark.

Keenan argues further that the State's highway easement is nothing more than a typical private easement that cannot interfere with the servient estate's use of property. In so arguing, Keenan ignores the plain language of the right of way deed for which the State paid $1600 in 1940. The deed specifically states that the easement is for a "public highway", a designation that was and is legally significant.

The right of way deed also provides a description of the easement that, as the uncontested evidence in the record establishes, resulted in the shoreline of the Keenan property being obliterated. In fact, the description of the easement in the deed meant that fill would be placed

up to seventy feet out onto the lake bed.

The language of the deed, as well as the relevant case law, also renders meaningless Keenan's reference to the history of the littoral rights associated with his property. ITD has never taken the position that the Keenan property did not historically have littoral rights, to include the right to build a private dock. However, the status of those littoral rights drastically changed when the Smiths, Keenan's predecessor in interest, sold an easement for a public highway to the State of Idaho in 1940. In short, Keenan has provided no basis upon which this Court should affirm the decision of the district court.

II. ARGUMENT

A. The Record Does Not Support Keenan's Assertions of Alleged Facts.

Keenan makes a number of assertions in his brief that are not based on evidence in the record. For example, Keenan asserts that the State placed "unauthorized fill" in the lake "in violation of the terms of the easement." Keenan Brief at 30. Keenan also states, "Incredibly, IDL claims that the Respondents' 'predecessors-in-interest expressly consented to having their shoreline filled in order to accommodate the highway'", and that "[t]here is no evidence that the Respondents' predecessors consented to allow the State to go outside of the specifically defined easement area if the intention was to usurp the underlying littoral rights." Keenan Brief at 18, fn. 9. The simple response to such unsupported allegations is that they contradict the language of the right of way deed. The deed alone establishes that the easement would obliterate the shoreline as it existed when the Smiths sold the easement to the State. By signing the deed, the Smiths agreed to have their shoreline covered with a state highway.

Keenan's assertions are also in clear contradiction to the uncontested testimony presented at the administrative hearing. As Dirk Roeller, the Idaho Transportation Department (ITD) surveyor, testified, the language of the deed indicated that the easement for the public highway extended as much as seventy feet out into the lake:

> Q.: Was the property – Exhibit E – Exhibit F is also your reference Deed B on Exhibit W, this is the right of way deed that covers the area in dispute, is that correct?
> A.: That's correct. This is a Vera G. Smith and Jack Smith right of way deed. My assistant labeled it "B" for her mapping index on Exhibit W. And this is the right of way deed that goes in front of Parcel 1114 and they were the owners at the time that this deed was written.
> Q.: From this analysis of this problem here that we're talking about today, what could you conclude about the location of this right of way, with respect to the lake?
> A.: This right of way started out at or near the waterfront or shoreline of that existing property and extends at station 65 plus 80, that's indicated there, and extends east to station 70 plus 12, which would be the east line of the subject property, ***which would be out into the lake as much as 70 feet from their shoreline.***

Amended AR at 16, p. 162, l. 22 – p. 163, l. 17[1] (emphasis added). Keenan did not refute Mr. Roeller's testimony with any evidence.

Further, Mr. Roeller carefully explained the history and development of the roadway that traverses the shoreline of Keenan's property, growing from a narrow 16' track to 125' of highway easement that wiped out the shoreline of the Smith property. Amended AR at 16, p. 92, l. 5 – p. 94, l. 7; p. 119, l. 4 – p. 138, l. 10. Here again, Keenan placed no contradictory evidence in the record, which would explain why he has failed to use the record to support his claims regarding the placement of fill in the lake.

[1] ITD has adopted the citation form to the Agency Record suggested by Keenan in the hope that such uniformity will be more convenient for the Court and other parties.

The claim that the State placed "unauthorized fill" into the lake is also in plain contradiction to the finding made by the IDL:

> However, the Right-of-Way Deed in 1940 contemplated filling into Lake Coeur d'Alene with seventy-five feet (75') on the right side of the center line (lakeward side) and into the lake. Further, the 1940 Right-of-Way Deed only utilized 0.920 acres of Vera G. and Jack Smith's property, the balance of the 1.240 acres described in the deed is over state owned lake bed, implying significant fill into the lake beyond the original shoreline as it existed at statehood, July 3, 1890. When the fill was placed waterward of the ordinary high water mark the littoral right to wharf out and maintain adjacency became subordinate to the highway and road prism as long as ITD retains the ownership of the "highway" for the public and its structures such as the embankments and fill.

R., Vol. 1, at 32. Based on the right of way deed and other evidence, the IDL concluded that the successors in interest had no littoral rights to exercise:

> The original shoreline is landward of the current shoreline, as is shown by the compilation of the historical as built drawings and the significant fill from the construction that took place as a result of the 1940 Right-Of-Way Deed, the littoral right became subordinate to the "highway" with the 1940 Right-Of-Way Deed. When that subordination occurred, the property lost those parts of their littoral rights which support the ability to wharf out. Without those littoral rights, the property was not qualified to make application according to IDAPA 20.03.04.020.02.

R., Vol. 1, at 33. Not surprisingly, Keenan has cited to nothing in the record that supports a contradictory conclusion. The IDL correctly determined, based on the language of the right of way deed and the evidence presented by ITD and not contradicted by Keenan, that the easement for the highway traversed the shoreline and extended out on to the bed of Lake Coeur d'Alene.

B. <u>The Existence Of Other Docks Is Of No Legal Consequence.</u>

Keenan continues to rely on the fact that other docks exist near the site of the proposed docks. Keenan cites no case law supporting his argument that because other docks exist, ITD

and the IDL are required to give him both a lakebed and right of way encroachment permit. Moreover, other than the fact that other docks exist, Keenan provided no evidence at the administrative hearing that would have allowed the IDL to base its decision on the existence of other docks. For example, Keenan could not even establish that ITD even knew whether the other dock owners had applied for an encroachment permit from ITD, as the following dialogue with Rick Carr, Keenan's witness, establishes:

> Q.: Okay. Now you reference the dock – the existing dock that you issued – that you have adjacent to Lot 1, correct? Do you recall that testimony?
> A.: State again.
> Q.: The dock that you have adjacent to Lot 1:
> A.: Correct.
> Q. : Okay. And you applied for that. Are you aware if the Department of Transportation was notified of that dock application?
> A: I don't know if they were notified or not.

Amended AR at 16, p. 32, ll. 8 – 18. In relation to the many other docks that Jan Carr (Mr. Carr's spouse) said exist along the highway right of way, she admitted she had no information regarding deeds or surveys that relate to those docks:

> Q. : When you examined those docks have you examined the right of way deeds that the state of Idaho obtained in front of each and every one of those parcels?
> A. : No, I have not.
> Q. : Are you aware of any surveys or are you aware of any kinds of surveys of those properties that you might have examined to illustrate the location of those properties to the lake?
> A. : A couple of those I have seen the survey marks on, yes.
> Q. : You've seen survey marks. Have you examined any of Department of Transportation road construction plans for those areas in question?
> A. : No, I have not.
> Q. : So you really don't know anything, except you saw the number of docks, is that correct?
> A. : Correct.

Amended AR at 16, p. 47, l. 10 – p. 48, l. 2.

One of the docks Keenan points to in support of his claim that ITD knew or knows that the Keenan property has littoral rights is the Carr dock. However, in spite of the fact that Rick and Jan Carr testified at the administrative hearing, they provided no evidence to support that they had the right to build a dock that encroached on the public highway right of way. They adduced no evidence that they owned property between the high water mark of the lake and the easement for the public highway. If they had any such evidence, one would think that they would have made it available to the hearing officer.

Keenan also points to the docks that exist adjacent to the Beach House or Silver Beach Marina as evidence that ITD and IDL know that Keenan has the right to a dock permit and the right to encroach on the public highway right of way. Keenan Brief at 14. In doing so, Keenan relies upon a judgment that owners of the Silver Beach property obtained against the State, which judgment provided that the property retained littoral rights. However, the evidence adduced at the administrative hearing established that the property has a much narrower right of way for the state highway, and has property between the high water mark of the lake and the highway right of way, as Jan Carr admitted:

> Q. : Would you turn to Exhibit 7 please? And could you tell me – tell the hearing officer how wide the right of way is adjacent to this Carlstead property on this Exhibit 7?
> A. : It's 50 feet on either side of the center line.
> Q. : Is there land between the summer-elevation, 2128, and the right of way line indicated on this map?
> A. : There appears to be.

Amended AR at 16, p. 39, ll. 12 – 21. See, also, Amended AR at 5, Exhibit 7. Further, the State

supplied testimony from Dirk Roeller as to why the right of way through the Silver Beach property was narrower and did not reach the lake:

> Q.: Why is there a difference in the width of the right of way?
> A.: Well, that's a good question. The – this plan indicates that there are structures and improvements on the lake ward side of the right of way. Primarily where the beach house is they show a hotel and I'm looking at the first – the second sheet, excuse me, the third sheet.
> Q.: Maybe I can make it easier for you, Mr. Roeller. I just want to show you – this is Plaintiff's Exhibit 7, and does that illustrate this – the right of way widths better for you?
> A.: Yes, that does. Yeah, that shows the right of way widths at that time.
> Q.: And then based upon what you see in this older map with the structures, do you have any ideas to why there's a difference in the right of way width? Why wouldn't they just take the whole width down the road?
> A.: Well, the reason they didn't is because the right of way width along this stretch of – in front of the beach house going east towards Silver Beach Road, we try to keep that riparian right with those particular parcels.
> Q.: Because?
> A.: Because they had hotels and business on that side of the street or on – essentially on both sides of the street. And so they had a commerce place that was acted and we wanted to make sure we could maintain that commerce.

Amended AR at 16, p. 150, l. 21 – p. 151, l. 25.

The only testimony presented by Keenan at the administrative hearing was through Rick and Jan Carr, owners of Lake Coeur d'Alene Investment, LLC., and its neighbors. Neither of those two witnesses presented any evidence regarding the location of the right of way across the Lake CDA or Keenan properties, or any evidence that contradicted anything stated by the State's witness, Dirk Roeller, a professional land surveyor, on those matters. Amended AR at 16, p. 78, ll. 13- 19.

In regard to the Hudson dock, Keenan understands, as evidenced by his witness Rick Carr, that ITD did object to the issuance by the IDL of a permit for it. Amended AR at 16, p. 61,

ll. 7 – 11. More importantly, as the record reflects, the Hudsons were able to prove to the IDL that they owned property between the high water mark of the lake and the right of way easement and were therefore entitled to a dock permit because their dock would not encroach upon the State's right of way. The Hudsons explained this to the district court judge in their "Opening Brief" filed in response to Keenan's opening brief. R. at 120-123. As the Hudsons correctly noted, the testimony of Dirk Roeller at the administrative hearing established that property existed between the highway right of way and the lake on the Hudson property. AR at 214-215.

Although throughout these proceedings, at every level, Keenan persists in pointing to other existing docks as evidence that he is entitled to a dock, Keenan has never adduced any evidence that supports that contention. Keenan has also failed to cite any legal authority for the proposition that because other docks exist, he is entitled to one.[2]

In order for the existence of the other docks to be relevant, Keenan would need to provide evidence demonstrating that the same facts existed in relation to all of the other docks. In other words, Keenan would need to provide evidence that the deed for the easement is the same as the one executed by the Smiths in 1940, that the other easements provided for the obliteration of the existing shoreline as it did with the Smith (now Keenan) property, and that the other dock owners had no property between the highway right of way and the lake. Without such evidence, Keenan's reference to the other docks is an argument devoid of any legal significance, and is, as

[2] Although the grandfathering of other docks was only mentioned in passing, it is also the case that other docks may have been grandfathered in under I.C. §58-1312, which went into effect on July 1, 2006, prior to the administrative hearing in this matter. Pursuant to that section, any dock built before January 1, 1975, does not need to have an encroachment permit. This fact makes Keenan's reliance on the existence of other docks even more meaningless.

the Hudsons appropriately noted, nothing more than saying, "They got one, we must get one too." R., Vol. 1, at 123.

C. Keenan Failed To Respond To ITD's Argument That An Easement for Private Railroad Is A Mere Easement.

Keenan's assertion that the State purchased for $1600 in 1940 the equivalent of a private easement contradicts the plain language of the right of way deed itself. Therein, the purpose of the easement is set forth twice – it is for a "public highway". AR at 116-117. As ITD pointed out in its opening brief, for hundreds of years the law has recognized that no encroachment is permitted on public highways. See, *Commonwealth v. King*, 54 Mass. 115 (Mass. 1847). No basis exists upon which to argue that the State was somehow purchasing a something akin to a private easement. It is perhaps for that reason that neither Keenan nor the district court has cited any authority asserting otherwise.

Keenan confuses an easement between private parties with an easement for a public highway or a private railroad. A common easement between private landowners bears no resemblance to an easement for a public highway or a private railroad. This Court has made clear that a private easement is not inconsistent with the use of the property over which the easement crosses:

> [A]n easement is the right to use the land of another for a specific purpose that is not inconsistent with the general use of the property by the owner." *Viebrock v. Gill,* 125 Idaho 948, 952, 877 P.2d 919, 923 (1994) (citing *Abbott v. Nampa Sch. Dist. No. 131,* 119 Idaho 544, 548, 808 P.2d 1289, 1293 (1991)). According to this Court's decisions, the owner of a servient estate may construct a gate across an easement to limit use of the easement to only those who have a right to use it. *Marshall v. Blair,* 130 Idaho at 682, 946 P.2d at 982 (citing *Gibbens v. Weisshaupt,* 98 Idaho 633, 570 P.2d 870 (1977); *Wood v. Brown,* 108 Idaho 739,

> 702 P.2d 777 (1985)). Use of a gate, or any other method of regulating an easement, by the owner of the servient estate must, however, be reasonable. *See Wood v. Brown,* 108 Idaho at 742, 702 P.2d at 780.

Lovitt v. Robideaux, 139 Idaho 322, 328, 78 P.3d 389, 395 (2003). Obviously, a public highway and a private railroad are inherently inconsistent with the general use of the property by the owner over whose property the easement crosses.

The status of the law regarding encroachment upon the right of way for a public highway was well established when the State purchased an easement from the Smiths in 1940. Moreover, that status was well established before the issue of the nature of land grants to private railroad companies was sorted out. As ITD explained in its opening brief, the federal courts eventually determined that a grant to a private railroad company under the federal laws of 1871 and thereafter is in fact an easement, not a transfer of ownership in fee simple. As explained by the U.S. Supreme Court, case law holding that a railroad held other than an easement under the federal laws of 1871 and thereafter was in error:

> Petitioner, seeking to obviate this result, relies on several cases in this Court stating that railroads have a 'limited', 'base', or 'qualified' fee in their rights of way. All of those cases, except *Rio Grande Western R. Co. v. Stringham*, 239 U.S. 44, 36 S.Ct. 5, 60 L.Ed. 136; *Choctaw, O. & G.R. Co. v. Mackey*, 256 U.S. 531, 41 S.Ct. 582, 65 L.Ed. 1076; and *Noble v. Oklahoma City*, 297 U.S. 481, 56 S.Ct. 562, 80 L.Ed. 816, deal with rights of way conveyed by land-grant acts before the shift in Congressional policy occurred in 1871. For that reason they are not controlling here. When Congress made outright grants to a railroad of alternate sections of public lands along the right of way, there is little reason to suppose that it intended to give only an easement in the right of way granted in the same act. And, in none of those acts was there any provision comparable to that of Section 4 of the 1875 Act that 'lands over which such right of way shall pass shall be disposed of subject to such right of way'. None of the cases involved

the problem of rights to subsurface oil and minerals.

In the *Stringham* case (239 U.S. 44, 36 S.Ct. 6, 60 L.Ed. 136) it was said that a right of way under the Act of 1875 is 'neither a mere easement, nor a fee simple absolute, but a limited fee, made on an implied condition of reverter in the event that the company ceases to use or retain the land for the purposes for which it is granted, and carries with it the incidents and remedies usually attending the fee'. The railroad had brought suit to quiet title to a portion of its right of way. *Stringham* asserted title to that portion by virtue of a purported purchase of surface rights from a placer mine claimant. The Supreme Court of Utah reversed the judgment of the trial court and remanded the case, directing the entry of 'a judgment awarding to the plaintiff title to a right of way over the lands in question'. 38 Utah 113, 110 P. 868, 872. The railroad again appealed, asserting that it should have been adjudged 'owner in fee simple of the right of way over the premises'. The Supreme Court of Utah affirmed the judgment of the trial court on the ground that the railroad's proper remedy was by petition for rehearing of the first appeal. 39 Utah 236, 115 P. 967. Both judgments were brought to this Court by writ of error. It was held that the second judgment presented nothing reviewable. The first judgment was affirmed since it 'describes the right of way in the exact terms of the right-of-way act, and evidently uses those terms with the same meaning they have in the act.'

The conclusion that the railroad was the owner of a 'limited fee' was based on cases arising under the land-grant acts passed prior to 1871 and it does not appear that Congress' change of policy after 1871 was brought to the Court's attention. That conclusion is inconsistent with the language of the Act, its legislative history, its early administrative interpretation and the construction placed on it by Congress in subsequent legislation. We therefore do not regard it as controlling. Statements in *Choctaw, O. & G.R. Co. v. Mackey,* 256 U.S. 531, 41 S.Ct. 582, 65 L.Ed. 1076, and *Noble v. Oklahoma City*, 297 U.S. 481, 56 S.Ct. 562, 80 L.Ed. 816, that the 1875 Act conveyed a limited fee are dicta based on the Stringham case and entitled to no more weight than the statements in that case . ***Far more persuasive are two cases involving special acts granting rights of way passed after 1871 and rather similar to the general act of 1875. Denver & R.G. Railway Co. v. Alling, 99 U.S. 463, 475, 25 L.Ed. 438, characterized the right so granted as 'a present beneficial easement' and Smith v. Townsend, 148 U.S. 490, 13***

S.Ct. 634, 636, 37 L.Ed. 533, referred to it as 'simply an easement, not a fee'. We think that the Act of 1875 is to be similarly construed.

Great Northern Railway Co. v. U.S., 315 U.S. 262, 277-289, 62 S.Ct. 529, 535-536, 86 L.Ed. 836 (1942) (emphasis added). As the U.S. Supreme Court stated, a grant to a railroad company under the laws of 1871 and 1875 is "simply an easement".

Thus, *Bowman v. McGoldrick* , 38 Idaho 30, 219 P. 1063 (1923), may have incorrectly used the "limited fee" language in reference to a railroad easement. However, that does not change the significance of the *Bowman* decision in relation to the instant case because an easement for a public highway clearly has at least as much in the nature of a "limited fee" as a railroad easement. Neither Keenan nor the district court has cited any authority for the proposition, one that is essential to support their positions, that a public highway easement is somehow legally less significant than an easement for a private railroad.

While this Court has never addressed the question of whether a railroad easement has more qualities of fee simple ownership than an easement for a public highway, the answer appears self-evident from Idaho case law regarding public highway easements and case law interpreting the nature of grants to private railroad companies under federal law. Keenan has failed to respond to ITD's argument on this issue and should therefore be viewed as having conceded the point.

Given the clear status of the law at the time the State purchased the right of way in 1940, the assumption must be made that the Smiths understood that they could make no use of the property over which the easement lay for any purpose that would interfere with its intended

purpose. Because the Smiths must have known that the easement and the public highway that was to be built on it would obliterate the shoreline as it existed based on the deed that they executed, their successors in interest have no basis to claim otherwise.

Nor is there any basis in the law for Keenan to claim ownership of any fill placed in Lake Coeur d'Alene by the State, regardless of whether the fill is within or without the easement for the right of way. This is another position for which Keenan, after three rounds of briefing, has failed to provide any legal support. The lake bed is obviously owned by the State, and the State placed the fill on the lake bed in order to construct the highway. How such activities provide Keenan with a right appurtenant to his property is a mystery, yet lack of legal basis has not prevented Keenan from asserting such rights.

D. <u>ITD Has Standing To Object To Application For Dock Permits.</u>

Keenan argues that because ITD's objections to the applications for dock permits were untimely at the administrative level and because ITD is not an adjacent property owner with littoral rights, ITD lacked standing to participate in these proceedings. However, Keenan did not raise the untimely objection argument at the agency level and has therefore waived the argument. *Lewis v. State Department of Transportation,* 143 Idaho 418, 146 P.3d 684 (Ct.App. 2006). [3]

In fact, Keenan barely mentioned the standing issue at the agency level, asserting only in

[3] The State has a property interest in the form of an easement that it purchased in 1940 and which easement traverses the old shoreline of the Keenan property. In fact, the easement and the public highway built upon it now form the current shoreline. Keenan stipulated to the fact that the State had been an "objector" at the agency level based on having an alleged property interest when stipulating to the intervention of ITD at the district court level. R., Vol. 1 at 43.

his prehearing brief that ITD owned no adjacent property to that of the applicants for a dock permit. Amended AR at 7, p. 14. Keenan failed to mention the standing issue in his post-hearing brief or the petition for review to the district court. ITD did address the standing issue in its post-hearing brief. Amended AR at 14, pp. 11-12. Keenan did raise the standing issue in his briefing to the district court. R., Vol. 1 at 97. In response, both ITD and IDL asserted the "most unusual" circumstances exception. R., Vol. 1 at 141-142; 185.

Keenan continues to assert that ITD falls outside of the statutory definition of those entitled to object and therefore lacks standing. Keenan's argument is without merit. The applicable statute, I.C. §58-1305, makes clear that under "unusual circumstances" as determined by the Idaho State Land Board, a hearing may be held upon objection to the encroachment application. Similarly, a hearing is to be held "if the proposed encroachment infringes upon or it appears it may infringe upon the riparian or littoral rights of an adjacent property owner." It is also clear from a review of I.C. §58-1305 that the ten (10) day time limit within which to file an objection to an application applies to adjacent property owners upon whose rights the encroachment may impinge. The time limits do not apply to situations involving "unusual circumstances" as determined by the Land Board. In fact, the Lake Protection Act does not prescribe any time limit for objections related to unusual circumstances.

The instant case appears to fall within the definition of "unusual circumstances" as described by this Court in *Dupont v. Idaho State Board of Land Commissioners*, 134 Idaho 618, 7 P.3d 1095 (2000). In *Dupont*, the plaintiff, who owned 158 feet of littoral property on Lake Coeur d'Alene, applied in March 1992 for a permit in order to build a private dock. The city did

not own adjacent property, so was not given notice of the application pursuant to I.C. §58-1305. However, the city was discussing the application with the Department of State Lands in March and April of 1992. Those discussions involved the application of city ordinances to the encroachment. Apparently, the city did not file an objection to the application, and on May 4, 1992, the Department granted the encroachment permit in spite of the knowledge that the city had designated the area including the proposed dock site as a public swimming area.

Subsequent to the issuance of the encroachment permit, on May 12, 1992, an adjacent landowner filed an appeal of the grant of the permit. On May 27, 1992, the city filed an objection to the permit and asked that the Department reconsider its grant of the permit. The Department held an informal reconsideration hearing and decided that the permit had been validly issued. In response to the adjacent landowner's objection, the Land Board decided to hold a contested case hearing. The hearing officer for that hearing permitted the city to intervene in the contested case proceedings on August 26, 1992. A contested case hearing was held in December 1992, resulting in a recommended order revoking the permit. The Land Board adopted the hearing officer's findings of fact, but not two of the conclusions of law.

The two conclusions of law not adopted by the Land Board included the conclusion that the hearing was a reconsideration of the issuance of the permit, and that the city was an adjacent land owner and entitled to notice of the permit application pursuant to the Lake Protection Act. The Land Board issued its decision revoking the dock permit on August 3, 1993, and the matter went to the district court on appeal, then to this Court.

One of the issues on appeal was whether substantial and competent supported the

decision to revoke the dock permit based on "the most unusual of circumstances". In reaching its decision, the Board had considered the use of the dock for motorized boats and of the fact that the city had passed an ordinance restricting the use of motorized boats in the designated swimming area wherein the proposed dock would be located. This Court found the designated swimming area and the related restrictive ordinance supported "the most unusual of circumstances" concept:

> Certainly, the existence of the designated swimming area in the location of the proposed encroachment is highly relevant to the question of whether the proposed encroachment presents "unusual circumstances."
>
> Additionally, the fact that the Board does not have the authority to regulate the use of the dock does not prevent the Board from considering the proposed use in its decision.

Dupont, 134 Idaho at 625, 7 P.3d at 1102. The same logic compels a determination that unusual circumstances exist in the case at bar.

IDL cannot regulate encroachments upon a public highway easement as that is the responsibility of ITD. No doubt for that reason, the grant of an IDL dock permit is contingent upon the property owner obtaining other required permits. As this Court stated in *Dupont*, "[i]t makes little sense for the Board to grant a permit for an encroachment when the intended use of the encroachment would violate applicable local and state laws." *Dupont*, 134 Idaho at 625, 7 P.3d at 1102. Here, it makes little sense for IDL to grant a dock permit that would violate laws that apply to the encroachment upon a public highway easement. Unusual circumstances exist in this case, thereby giving ITD standing to object and intervene outside the time limits that apply to typical adjacent property owners.

E. Estoppel Does Not Support The District Court Decision.

Keenan argues that estoppel prevents ITD and IDL permitting Keenan to encroach on the highway easement without an encroachment permit from ITD. Keenan Brief at 30. Keenan does so without citing any legal authority for his position or demonstrating how the evidence supports an estoppel claim. One reason asserted by Keenan in support of his estoppel argument is a statement that ITD "has no objection to [Respondents] exercising their right of access to the Lake." Respondents' Brief at 30. Only by taking a comment made by counsel for ITD in a brief out of context and misinterpreting it does Keenan make an estoppel argument that is patently without merit.

The statement is from a brief entitled *Idaho Transportation Department's Response Memorandum* that ITD submitted to the district court in opposition to the appellate brief filed by Keenan. The section of ITD's brief from which the quote is taken is entitled "The Appellants Do Not Have Littoral Rights For The Subject Dock". R. Vol. 1, at 173. The section argues, citing *Bowman v. McGoldrick Lumber Co.*, 38 Idaho 30, 219 P. 1063 (1923), that Keenan has no littoral rights, and distinguishes *West v. Smith*, 95 Idaho 550, 511 P.2d 1326 (1973). In discussing the *West* decision, ITD noted that the case simply decided that West's right to access the lake was not cut off by the county road easement. Ergo, in this case, as noted by ITD, Keenan can still walk across the highway easement and get to the lake. There is no basis to read anything more into the comment.

ITD also noted at the time that the right to access the lake is but one aspect of littoral rights, and that a right to build a dock and wharf out is another separate littoral right. ITD noted

that in the instant case, the right to a dock, not the right to access the lake, is the right at issue. ITD further noted that under the current management of the State's right of way along Keenan's property, Keenan and the rest of the public already have the right to access the lake. With those distinctions in mind, ITD stated that it had no objection to Keenan exercising their right to access the lake. R. Vol. 1, at 175. There is simply no way that ITD was stating that Keenan had the right to build a dock on the State's right of way when making that statement.

Although the assertion has no legal underpinnings, Keenan asserts in relation to his estoppel argument that his encroachment on to the right of way is really deminimis, stating that he has "proposed no encroachments of any significance on any authorized portion of the ITD right-of-way as defined by the easement." Respondents' Brief at 31. Not only does that argument fly in the face of established law on encroaching public highway right-of-ways, but is indefensible considering Keenan's reliance on *West v. Smith,* 95 Idaho 550, 511 P.2d 1326 (1973), which ruled that the little wooden gangplank placed by Smith on West's property had to be removed because it violated West's littoral property rights.

Keenan also argues that ITD and IDL are subject to quasi-estoppel and therefore cannot deny that Keenan has the right to build a dock that encroaches on the highway right of way. Keenan Brief at 35. ITD cannot find any evidence that Keenan raised the quasi-estoppel evidence at the agency level and should therefore be viewed as having waived the argument.

Further, the argument has no merit. Keenan essentially argues that because the property had littoral rights, docks are shown on Exhibit S, and one dock (not on the Keenan property) has been around for 60 years, ITD and IDL cannot deny Keenan a dock permit. As discussed above,

Exhibit S and its picture of a dock on it has no legal significance regarding littoral rights. Nor do the existence of any other docks have any legal significance, except for the fact that the record demonstrates that the dock application that ITD did know about, it objected to. Keenan presented no evidence at the hearing that would make the existence of other docks legally relevant to these proceedings.

Keenan also asserts that the road prism is outside the right of way. The IDL found, and the evidence presented at the administrative hearing established, that the dock would have encroached on the right of way. The law at the time the Smiths sold the easement to the State, as discussed above, did not allow encroachment onto a public highway easement. Contrary to Keenan's claims, ITD and IDL are not trying to change the status of property rights with statutes and rules promulgated after the purchase of the easement. Smith never had the right to encroach on the public highway easement, and neither do the Smiths' successors in interest.

Keenan has not demonstrated that ITD has taken an inconsistent position on the encroachment of other docks onto the public highway right of way, for the simple reason that he has never provided any evidence that ITD approved, or even knew of the application for, other docks under the same or very similar situation as in the instant case. Further, the evidence in the record establishes that ITD did object when it knew of such applications, and that the Silver Beach property has a different size easement on its property. For these reasons, the estoppel theory does not prevent ITD or IDL from preventing an encroachment onto the public highway easement.

F. The 1995 Baker Letter Does Not Establish ITD Policy Or Littoral Rights.

Contrary to the assertions of Keenan, individuals employed as district engineers by the Idaho Transportation Department, do not make policy for the Idaho Transportation Board or the State of Idaho. Keenan has provided no authority that the letter written by Tom Baker, an ITD district engineer in 1995, does establish state policy on littoral rights. A staff person cannot bind the State to a policy expressed in a letter that does not reflect Board-adopted policy. The only entity that can create policy regarding the state highway system is the Idaho Transportation Board. I.C. § 40-310; § 40-312.

Keenan relies on that letter to claim that the State has a policy of letting property owners build docks on the State's right of way. The language of the letter itself disputes Keenan's use of it. The 1995 Baker letter, as set forth on page 9 of the Keenan Brief, specifically states that ITD has "no objection" to the IDL issuing dock permits "where there is evidence that the property lines originally extended to the lakeshore and riparian rights exist." That is a fundamental question in the case at bar, whether Keenan has littoral rights that include the right to wharf out given that his predecessors in interest sold an easement for a public highway to the State and the easement obliterated the shoreline.

Further, no evidence in the record establishes that the Baker letter is referring to Keenan's property, or any property along Lake Coeur d'Alene. The letter is obviously not referring to the easement at issue in the instant case because the letter discusses a fifty foot easement, in contrast to the 125' easement that crosses Keenan's property.

G. Exhibit S Does Not Establish Littoral Rights For Keenan.

From the outset of the administrative proceedings to the present, Keenan has persisted in referring to Exhibit S as an "as built" drawing, and then making an incredible leap in logic by stating that because a dock is shown in the drawing, ITD and IDL know that Keenan can build a dock on the highway easement that has obliterated the shoreline on his property. See Keenan Brief, pp. 18-19. Exhibit S is not an "as built" drawing, and nowhere in the record is there any evidence establishing it as such. Moreover, Exhibit S certainly does not represent all the improvements required by the 1940 easement. Nowhere in the deed for the easement or any of the project plans is there an indication that a dock was built as an improvement to Smith's property, or anyone else's property, as a result of the 1940 right of way deed. No basis exists for Keenan to claim that Exhibit S represents legal support for the argument that the State knew Keenan had littoral rights. Keenan's reference to the agency hearing transcript (Amended AR at 16, pp. 178-81) certainly does not establish that Exhibit S is an "as built" drawing.

In fact, the referenced colloquy makes clear that the State did not place any significance whatsoever on the fact that the drawing that is Exhibit S happened to show an existing dock:

> Q.: So if the Transportation Department, at or about this historical time in 1945 or 1950, whatever it is, but after the 1940 right of way was executed, was of the belief that the owner of the subject property didn't have riparian rights, they seemingly didn't indicate it on this map, did they?
> A.: Can you be more precise with your questioning?
> Q.: You can't have a dock without a riparian right, can you?
> A.: Certainly. We have many docks out there that are out there today that don't have riparian rights. And I believe that the dock that's shown here is shown in incident to the survey that was done, but doesn't indicate that there was a permit given or a right for that dock to be there.

Amended AR at 16, p. 180, l. 17 – p. 181, l. 7.

Further, Keenan's assertion that Exhibit S is an "as built" plan directly contradicts the foundational testimony establishing the nature and purpose of the document:

> Q.: Okay, bear with. I'd like to turn to Exhibit S. And I'd like you to explain for the hearing officer what this is.
> A.: Exhibit F is –
> Q.: Excuse me, Exhibit S.
> A.: S as in Sam?
> Q.: As in Steve.
> A.: As in Steve. Exhibit S is a calculation and topo sheet that's used for the design of highways, particularly in this stretch what would have been called 95A or US-10.
> Q.: And is the area in dispute on here?
> A.: It is on the third sheet back – Parcel Number 1114 is identified there. And so the perimeter of Parcel Number 1114 is indicated by a blue shaded area around that perimeter.
> Q.: Just for clearing purposes, this exhibit is several pieces of one large sheet?
> A.: That's right. Actually this sheet is about three foot wide and about 28 feet long. And so this is just one portion of it that we've photographed. And just to kind of give you an idea, this stretch of highway between here and Higgins Point is about 5.7 miles. We have five rolls that cover that stretch and they're all each about 25 to 30 feet long.
> Q.: And this is again a document that's located in ITD?
> A.: Yeah, this is in the ITD files.
> Q.: What's the date on it?
> A.: That's something that I have a difficult time trying to determine. It's not marked specifically, but based on what it shows me here I would anticipate that it is about 1945 or '50.
> Q.: So this would have been after the construction project in the early 40s?
> A.: That's correct.
> Q.: And what were they doing here? Why did they do this?
> A.: The main purpose of this is to try and gather data so that they can make a determination if they need to take additional right of way, what that will impact. It also has a topographic map overlaid the property lines so they have an idea where the shoreline is at that particular time. It shows the slope of the grade on – both above and below that shoreline. It shows the location of any fill that was placed in that area and what the slopes are of that fill. It shows the location of structures, which would include homes, coverts, well locations, things that indicate, you know, what was in existence at that time.

Amended AR at 16, p. 146, l. 1 – p. 148, l. 1.

As the uncontested testimony of Mr. Roeller established, Exhibit S is not an "as built" drawing showing the improvements associated with the 1940 right of way deed, but a calculation and topo sheet used to assist with future highway planning and design. Exhibit S no more shows ownership of littoral rights than it does ownership rights associated with the wells and homes indicated on the drawing.

H. Keenan Is Not Entitled To Attorney Fees.

Keenan barely bothers to support a claim for attorney fees on appeal, spending about ten lines of text on the issue. Keenan claims that ITD and IDL have "proceeded without a reasonable basis in fact" because of an alleged course of conduct for seventy years. Keenan Brief at 39. ITD has already discussed the lack of merit to that argument. Keenan's claim that ITD has not supported its position regarding the subordination of littoral rights by the public highway easement is somewhat amazing given the number of federal and state cases cited by ITD in its opening brief.

III. CONCLUSION

Keenan has not provided this Court with an adequate basis upon which to sustain the decision of the district court. The showing required by I.C. §67-5279 has not been made and the reversal by the district court of the administrative decision by the IDL should itself be reversed. The agency decision should hold sway based on the unchallenged testimony and evidence adduced at the administrative hearing, and the clear legal precedent that encroachment upon a public highway right of way is prohibited. Case law at the federal and state level also makes

clear that an easement for a public highway subordinates the right of a landowner to build a dock that encroaches on the easement.

Respectfully submitted this 24th day of August, 2009.

CHRIS KRONBERG
Deputy Attorney General
Idaho Transportation Department

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 24th day of August, 2009, I caused to be served a true and correct copy of the foregoing by the method indicated below and addressed to the following:

David Stanish
Deputy Attorney General
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